Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–56 OF 1993
EUSOFF CHIN CHIEF JUSTICE, EDGAR JOSEPH JR AND WAN YAHYA FCJJ
30 MAY 1995

Administrative Law *— Remedies — Certiorari — Award of Industrial Court — Application for leave to apply for certiorari — Ex parte application — Whether applicant has duty to disclose all material facts — Whether applicant has arguable case — Rules of the High Court 1980 O 53 r 1(2)*

Civil Procedure *— Certiorari — Application for leave to apply for order of certiorari to quash award of Industrial Court — Whether affidavit in support must contain substantial particulars — Rules of High Court 1980 O 53 r 1(2)*

Labour Law *— Industrial Court — Award — Reinstatement — Whether subject to stay of proceedings — Industrial Relations Act 1967 s 33B(2)*

The employer ('respondent') in this case had obtained leave to apply for certiorari in the High Court to quash an award which was made in favour of the employee ('appellant') by the Industrial Court. Dissatisfied, the appellant made an application to the High Court to set aside the order for leave, on the grounds inter alia, that: (i) the respondent had failed to disclose a material fact in their application for leave, ie that it had applied to refer seven questions of law to the High Court; and (ii) the respondent had not complied with the requirements of O 53 r 1(2) of the Rules of the High Court 1980 ('RHC'). The appellant's application was dismissed and an order for stay of the award of the Industrial Court was made. The appellant has appealed.

Held, allowing the appeal:

(1) Since the application for leave to apply for certiorari was made ex parte, there was a duty of disclosure of material facts imposed by law on the respondent, the breach of which could result in the order for leave being set aside. However, in the present case, there was no duty on the part of the respondent to disclose their application for a reference as the application for reference was only made after the leave was obtained.

(2) Although the proceedings for judicial review are not meant for detailed enquiry into contested facts, it is necessary for an applicant under O 53 r 1(2) of the RHC to ensure that his affidavit and statement in support of the application contain substantial particulars, so that the court would have a complete picture of his case. In this case, there was insufficient material in the

respondent's affidavit and statement for the High Court to have granted leave under O 53 r 1(2).

(3) The order for leave to apply for a certiorari should also be set aside on the further ground that the respondent was bound to fail had there been a substantive inter partes application for certiorari, as there was absolutely no arguable case in respect of the respondent's application.

(4) The order for stay should also be discharged following the setting aside of the order for leave, and also pursuant to s 33B(2) of the Industrial Relations Act 1967, which prohibits any court from making an order for stay of an award of reinstatement or re-employment, as in this case. Section 33B(2) being a specific measure regarding reinstatement or re-employment of a workman, had overriding effect over s 25 of the Courts of Judicature Act 1964 and O 53 r 1(5) of the RHC. The award of the Industrial Court would thus be restored accordingly.

[Bahasa Malaysia summary

Pihak majikan ('responden') dalam kes ini telah mendapat kebenaran untuk memohon bagi perintah certiorari di Mahkamah Tinggi supaya membatalkan suatu award yang telah dibuat oleh Mahkamah Perusahaan, yang memihak pada pekerja ('perayu'). Perayu berasa tidak berpuas hati lalu memohon kepada Mahkamah Tinggi untuk mengenepikan perintah kebenaran tersebut atas alasan, antara lain, bahawa: (i) responden telah gagal untuk mendedahkan suatu fakta material dalam permohonannya untuk kebenaran, iaitu bahawa ia telah memohon untuk merujuk tujuh soalan undang-undang ke Mahkamah Tinggi; dan (ii) responden gagal memenuhi syarat-syarat di bawah A 53 k 1(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') di dalam permohonannya. Permohonan perayu tersebut telah ditolak, dan suatu perintah untuk menggantungkan award Mahkamah Perusahaan itu telahpun dibuat. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Oleh kerana permohonan untuk kebenaran bagi memohon untuk perintah certiorari dibuat secara ex parte, undang-undang mengenakan suatu kewajipan atas responden untuk mendedahkan fakta material, yang jika dimungkiri oleh responden akan menyebabkan pengenepian perintah kebenaran yang berkenaan. Walau bagaimanapun, di dalam kes ini, tidak terdapat kewajipan pada pihak responden untuk mendedahkan permohonannya untuk suatu rujukan kerana permohonan untuk rujukan tersebut hanya dibuat selepas kebenaran telah diperolehi.

(2) Walaupun prosiding untuk kajian semula kehakiman tidak bertujuan untuk suatu siasatan dijalankan secara terperinci terhadap fakta-fakta yang dipertikaikan, adalah perlu bagi seseorang pemohon di bawah A 53 k 1(2) KMT untuk memastikan bahawa afidavit dan pernyataan yang menyokong permohonannya harus mengandungi butir-butir yang penting, supaya mahkamah dapat gambaran yang menyeluruh tentang kes pemohon. Di dalam kes ini, afidavit dan pernyataan responden tidak mempunyai material yang memadai untuk membolehkan Mahkamah Tinggi memberikan kebenaran di bawah A 53 k 1(2).

(3) Perintah kebenaran untuk memohon bagi perintah certiorari harus juga diketepikan atas alasan yang selanjutnya bahawa responden tentu akan terkandas jika suatu permohonan substantif dibuat untuk certiorari secara inter partes, kerana langsung tidak terdapat kes yang dapat dihujahkan berkenaan dengan permohonan responden itu.

(4) Perintah penggantungan tersebut juga akan diketepikan, akibat pengenepian perintah kebenaran itu dan juga mengikut s 33B(2) Akta Perhubungan Perusahaan 1967 yang melarang mana-mana mahkamah daripada memberikan perintah penggantungan sesuatu award pengembalian atau penggajian semula, seperti di dalam kes ini. Seksyen 33B(2) merupakan suatu peruntukan spesifik berkenaan dengan pengembalian atau penggajian semula seorang pekerja, dan mengatasi s 25 Akta Mahkamah Kehakiman 1964 dan A 53 k 1(5) KTM.]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed) paras 48–167, [1991] Mallal's Digest 19–26; [1992] Mallal's Digest 13–14; [1993] Mallal's Digest 7–9.

For cases on awards of the Industrial Court, see 8 *Mallal's Digest* (4th Ed) paras 695–707; [1989] Mallal's Digest 951; [1991] Mallal's Digest 1283.

Cases referred to

AMZ Corp Sdn Bhd v Sye Ah Chai [1989] 1 MLJ 238 (distd)

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228 (folld)

Edwards (Inspector of Taxes) v Bairstow & Anor [1956] AC 14; [1955] 3 All ER 48; [1955] 3 WLR 410 (folld)

O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 All ER 1124; [1982] 3 WLR 1096 (folld)

R v Bromsgrove District Council, ex p Kennedy (*The Times*, 28 November 1991) (folld)

R v Governor of Pentoville Prison, ex p Herbage (No 2) [1987] QB 1077; [1987] 1 All ER 324; [1987] 2 WLR 226 (folld)
R v Secretary of State for the Home Department, ex p Angur Begum [1989] COD 398 (folld)
R v Secretary of State for the Home Department, ex p Khalid Al-Nafeesi [1990] COD 106 (folld)
R v Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107 (folld)
R v Secretary of State for Trade and Ors, ex p Anderson Strathclyde plc [1983] 2 All ER 233 (folld)
Stanley Ng Peng Hon v AAF Pte Ltd [1979] 1 MLJ 57 (folld)
Trengganu Bus Co Sdn Bhd v Transport Workers Union [1983] 1 MLJ 393 (distd)
Tuan Hj Abdul Rashid v Patco Malaysia Bhd [1991] 1 SCR 390 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25
Industrial Relations Act 1967 ss 20(3), 33, 33A, 33B(2)
Rules of the High Court 1980 O 53 rr 1(2), 1(5), 3

B Lobo (*Lobo & Associates*) for the appellant.
Ambiga Sreenevasan (*Skrine & Co*) for the respondent.

Edgar Joseph Jr FCJ (delivering the grounds of judgment of the court): The principal question in this appeal was whether the respondent, Patco Malaysia Bhd ('the employer'), had satisfied the requirements of O 53 r 1(2) of the Rules of the High Court 1980 ('the RHC'), when it had obtained leave of the High Court by order dated 22 May 1992 ('the order for leave'), to apply for an order of certiorari to remove to the High Court for the purpose of it being quashed, an award of the Industrial Court dated 27 April 1992 ('the award of the Industrial Court'), made pursuant to a finding by the Industrial Court that its employee, the first appellant Tuan Hj Sarip bin Hamid ('the employee') had been dismissed without just cause or excuse and, in consequence, had been ordered to be reinstated as its general manager and paid various financial reliefs with retrospective effect.

An application had then been made by the employee by notice of motion dated 30 June 1992, supported by affidavit, to set aside the order for leave on the ground, inter alia, that there had been non-disclosure of a material fact and non-compliance with the requirements of O 53 r 1(2) of the RHC, but this was dismissed and an order for stay of the award of the Industrial Court ('the order for stay') made. It was against this order of dismissal and the order for stay comprised in the judgment of the High Court dated 26 January 1993 ('the judgment of the High Court dated 26 January 1993') that the employee had appealed to this court.

At the conclusion of the arguments, we had allowed the appeal with costs here and in the High Court, to the employee, and set aside the judgment of the High Court, dated 26 January 1993, the effect of which was to discharge the order for leave and the order for stay, as well as to restore the award of the Industrial Court in its entirety. The deposit paid into court by way of security for costs of the appeal was to be refunded to the employee. We intimated then that we would be giving our reasons in writing for our decision, and this we now do.

First of all, as regards the point about alleged non-disclosure of a material fact, this was fully argued before us and we find it unnecessary to discuss it again. Suffice to say that we found no substance whatever in the point.

Next, we must address the remaining points in this appeal.

To put the matter in perspective, the provisions of O 53 r 1, which it would be convenient to reproduce, are these:

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Court or Judge may, in granting leave, impose such terms as to costs and as to giving security as it or he thinks fit.

(5) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Court or Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Court or Judge otherwise orders.

Order 53 r 3 sets out the *manner* in which an application for judicial review is made. It provides:

(1) Copies of the statement and of the affidavits in support of the application for leave under rule 1 must be served with the notice of motion or summons under rule 2 and, subject to paragraph (2), no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and relief set out in the said statement.

(2) The Court or Judge may on the hearing of the motion or summons allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of any affidavit of any other party to the application, and where the applicant intends to

ask to be allowed to amend his statement or use further affidavits, he must give notice of his intention and of any proposed amendment of his statement to every other party, and must supply copies of such further affidavits.

(3) Every party to the application must supply to any other party copies of the affidavits which he proposes to use at the hearing.

The salutary advice of Dunn LJ in *R v Secretary of State for Trade & Ors, ex p Anderson Strathclyde plc* [1983] 2 All ER 233 should be kept in the forefront of the mind of any lawyer who drafts the statement for purposes of O 53 r 1(2), and the affidavit in support thereof. What the learned Lord Justice said was this (at p 239f):

> ... Proceedings for judicial review are not designed for detailed enquiry into contested facts. It is for the applicants to take all proper steps to put the facts on which they rely in support of the relief claimed before the court at the first opportunity ...

Similarly, it is worthwhile for the draftsman to remind himself of what Lord Diplock had said in *O'Reilly v Mackman* [1983] 2 AC 237 at p 282; [1982] 3 All ER 1124 at p 1132; [1982] 3 WLR 1096 at p 1107, namely:

> ... The facts ... can seldom be a matter of relevant dispute on an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in *Edwards (Inspector of Taxes) v Bairstow & Anor* [1956] AC 14 at p 36; [1955] 3 All ER 48 at pp 57–58) ...

Having said that, we would add that it is a counsel of prudence for a lawyer drafting his application under O 53 r 1(2) to ensure that it contains substantial particulars of the facts and matters on which he intends to rely in support of his application. He should also ensure that his affidavit in support of his application is as detailed and comprehensive as the circumstances will permit, and it should exhibit all the documentary exhibits which are truly relevant and upon which he intends to rely. The object of these steps is to ensure that the court has as complete a picture as is possible right from the start, of the case for the applicant who is seeking judicial review.

In *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, Ajaib Singh SCJ, speaking for the Supreme Court said this:

> The guiding principles ought to be that the applicant must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

Moreover, as the application for leave is made ex parte, there is a clear duty of disclosure, imposed by law on the applicant, the breach of which may — depending upon the importance of the non-disclosure — result in the order for leave being set aside. (See, eg *R v Governor of Pentonville*

Prison, ex p Herbage (No 2) [1987] QB 1077; [1987] 1 All ER 324; [1987] 2 WLR 226.)

We are supported in our views regarding the requirements of the application for leave and the affidavit in support thereof under O 53 r 1(2) by the following passages in the book *Judicial Review* by Michael Supperstone QC and James Gourdie QC which we thoroughly approve of, at pp 356 and 357:

> Although O 53 is designed to be operated with a large degree of flexibility, it is necessary at the stage of preparing the Form 86A to consider the precise nature of the case that is being brought. It is necessary to identify with precision the decision that is being complained of, and the relief that is sought. The affidavit in support of the application and the statement, on Form 86A, of the grounds upon which relief is sought read together should be drafted so as to enable the court to grasp the essential characteristics of the factual background and the nature of the arguments that the applicant intends to bring.
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> Form 86A needs to be supported by 'an affidavit which verifies the facts relied on' (see O 53 r 3(2)(b). In determining the extent of the affidavit evidence at the leave stage, it is necessary to bear in mind two matters:
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> (i) applications for leave are ex parte, and like all ex parte applications must be made uberrimae fidei. A failure to disclose material relevant to the grant of leave would provide an opponent with cogent material on which to apply to set aside the leave and would entitle the court (if so minded) to refuse to grant relief of its own motion. Accordingly, care must be taken to ensure that full disclosure is made of relevant material (including material as to what has transpired in any interval between the decision and the application — which may be highly germane to any issue on delay). Any explanations by the decision-maker of his decision (eg in an immigration case, between a Member of Parliament and the Home Secretary) must be disclosed to the court, as, self-evidently, must the full decision letter. The case of *R v Jockey Club Licensing Committee, ex p Wright* [1991] COD 306 provides a graphic example of a material non-disclosure of facts which 'any reasonably competent lawyer should and would have known were material matters' founding a successful application to set aside leave;
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> (ii) on the other hand there can be a danger in certain types of judicial review applications of overloading the court with documentation. In preparing the documentation it is necessary to bear in mind the limited nature of the jurisdiction of the judicial review court, and only to exhibit documentation that is truly relevant to that jurisdiction. Cases turning on statutory construction, for example, require relatively little background information. The courts do not welcome large amounts of extraneous material that do not advance consideration of the legal issues involved.

On the last question whether hearsay material may be referred to in the affidavit in support of the application for leave, the learned authors have this to say at p 357 para 2, and we agree:

A It is not entirely clear whether the affidavit in support of the application for leave should be regarded as interlocutory in character or otherwise. This has a possible significance in terms of whether hearsay material may strictly be admitted. The application for leave itself is undoubtedly interlocutory; however, if leave is granted, the affidavit in support of the leave application is served together with the notice of motion and forms the first basis of the B applicant's case in the substantive application. As a matter of practice, a degree of common sense should be exercised in selecting the identity of the deponent. In cases where the attack is on the reasoning of a written decision as disclosing an error of statutory construction, it may be that fairly formal affidavit in support from a solicitor instructed in this case, exhibiting the decision and other essential material would suffice. At the other extreme, in C an immigration case where the issue was whether as a matter of fact the immigrant was or was not an illegal entrant, it would be highly desirable if not essential to have direct evidence at the leave stage on the disputed facts from the immigrant himself.

In *R v Secretary of State for the Home Department, ex p Rukshanda Begum* D [1990] COD 107, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:

(i) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

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(ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend F and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, ... namely: if, taking account of a brief argument G on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

Before us, the sufficiency of the statement contained in the notice of application for leave under O 53 and the affidavit filed in support thereof was argued at great length, and it is not necessary for us to discuss it again. H Suffice to say, that having regard to the authorities cited, we were completely convinced that the contents of the affidavit left much to be desired, so much so that there was insufficient material for the judge to have granted leave.

But the matter does not rest there. Before us, counsel for the employer made no attempt whatever to contend, by way of alternative — as she I undoubtedly could have — that even if the order for leave had been granted on the strength of an application and affidavit in support which

suffered from the defects alleged, and so did not comply with the requirements of O 53 r 1(2), yet the merits of the employer's case were such that it could not be said that there was absolutely no arguable case to be advanced on its behalf at the inter partes hearing of the substantive application for certiorari to be filed, and so, on that ground, the appeal should be dismissed. But, to be fair to counsel for the employer, she did so contend, and successfully too, in the High Court.

We therefore considered that even though, before us, counsel for the employer had not taken the point relating to the merits of her client's case to support the judgment of the High Court dated 26 January 1993, we should take the point suo motu, in order to satisfy the insistent demands for justice and for the sake of completeness, especially since the employer's application for leave to apply for an order of certiorari aforesaid did seek to impugn the award on traditional grounds to which we shall presently refer. Moreover, the judge himself did rely on the merits of the employer's case when dismissing the employee's application to set aside the order for leave, having regard to his concluding observation which reads:

> In my view, by reading the statement (not in affidavit), particularly the reliefs sought and the grounds which consist of statement of court records and the affidavit in due form, stating the facts on oath, I am of the view that O 53 had been complied with as when they are together read, answer that an arguable case can be made out if the applicant succeeds in his proof. I therefore find that the applicant has no merit in his objection (sic).

A scrutiny of the record of appeal provided shows that the learned chairman of the Industrial Court (Mr W Satchithanandhan) had written long, carefully worded and well reasoned grounds to justify the award.

The pivotal point in the case being a finding of primary fact by the Industrial Court that the enforced resignation of the employee was, having regard to all the circumstances, no resignation and therefore tantamount to a dismissal in law (*Stanley Ng Peng Hon v AAF Pte Ltd* [1979] 1 MLJ 57).

There were also findings of fact by the Industrial Court which impugned the bona fides of the allegations of misconduct on the part of the employee by reason of the very late stage at which the allegations were first put to the employee. In the words of the Industrial Court:

> Misconduct was only put to the claimant in the Industrial Court which the claimant denied five years after his dismissal. The truth and fact of the matter is that the alleged misconduct of the claimant did not in the light of the evidence adduced operate on the mind of YB or the [board of directors] when YB asked the claimant to write his letter of resignation or when the ouster resolution was passed. The company was retaliating at the claimant's decision to sell his shares and wanted him to resign.

It is implicit in the findings aforesaid that, contrary to the submission of counsel for the employer in the High Court, the charges of misconduct made by the employer against the employee had been considered by the

A Industrial Court and found to be groundless. Such findings of fact are not open to review by the High Court or by this court in the exercise of its supervisory powers except on the principles laid down by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow & Anor* [1956] AC 14 at p 36; [1955] 3 All ER 48 at pp 57–58; [1955] 3 WLR 410 at pp 422–423, and applied by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237; [1982] B 3 All ER 1124; [1982] 3 WLR 1096. In our view, upon the evidence before it, the Industrial Court was entitled to make the findings of fact which it did. The fact that we might have come to a different conclusion is beside the point. Accordingly, it could not be said that any of those findings were perverse.

C Furthermore, neither the award nor the reasons therefor, suffered from any jurisdictional error or were they violative of the rules of natural justice or vitiated by errors of law apparent on the face of the record. Moreover, we could detect no trace of bias. We were therefore of the view that a substantive application for certiorari — had there been one — was D bound to fail and so, on this further ground also, the order for leave ought not to have been granted.

At this point, we would interpolate to add, by way of background, that in a sense, the litigation arising from the disputes between the employer and the employee, has had a long and chequered history, and it is to this that we should now like to refer.

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When the employee's case (No 1:3/4–117/87) first came up for hearing before the Industrial Court on 6 February 1988, pursuant to a reference dated 10 March 1987 under s 20(3) of the Industrial Relations Act 1967 ('the Act'), counsel for the employer had raised the preliminary objection that the employee was not a 'workman' within the meaning of F the Act, as the employee was a director and general manager of the employer at the material time, but the objection was overruled.

In consequence, the employer had successfully applied to the Industrial Court to refer to the High Court the question of law whether the Industrial Court was right in so holding, and the High Court had answered that G question in favour of the employer.

However, on appeal to the Supreme Court, that court reversed the High Court and restored the ruling of the Industrial Court that the employee was indeed a 'workman' within the meaning of the Act. (See the judgment of the Supreme Court reported under the name, *Tuan Hj Abdul Rashid v Patco Malaysia Bhd* [1991] 1 SCR 390, wherein the facts of the H case are also set out at length).

Next, we must mention that on 27 May 1987, the employer had commenced proceedings in the High Court, being Civil Suit No D–4–22–165–87, for damages and for declaratory relief, but the suit had been struck out by consent, on 10 December 1991, upon the application of the I employee to strike it out for want of prosecution, no defence having been filed by the employee. (See p 722 appeal record vol III part C — continuation volume).

Then, on 26 May 1992, that is, some 29 days after the award was made and four days after the order for leave had been obtained — the employer had filed an application under s 33A of the Act, praying that the Industrial Court do refer seven questions of law to the High Court (see pp 724–725 appeal record vol III part C — continuation volume), which application is still pending.

We would observe, in passing, that there was thus no duty on the part of the employer, at the hearing of the ex parte application for leave to apply for an order of certiorari, to disclose the application for a reference under s 33A of the Act, since none was then pending before the Industrial Court. [Contrast, the case of *AMZ Corp Sdn Bhd v Sye Ah Chai* [1989] 1 MLJ 238 and *Trengganu Bus Co Sdn Bhd v Transport Workers Union* [1983] 1 MLJ 393.]

However, at the inter partes hearing of the application to discharge the order for leave before Abu Mansor J (as he then was), counsel for the employee had contended that the application for reference under s 33A of the Act raised questions which were, in substance, the same as those arising upon the application for certiorari. On the other hand, counsel for the employer had contended that the questions arising for decision upon the application for reference under s 33A of the Act were wholly different from those arising upon the application for certiorari, and she had painstakingly prepared a comparative table setting out what she considered were the differences to illustrate her contention.

In our view, bearing in mind that the application for reference under s 33A of the Act is still pending before the Industrial Court, we do not consider it right or fair for us to express any view on the issues which arise for decision regarding this part of the case. The Industrial Court will have to make up its own mind as to whether to grant or refuse the application for reference under s 33A of the Act after, of course, having heard counsel on both sides.

For the avoidance of doubt, we must also add that although we have held that so far as the questions arising for decision on the present appeal are concerned, we do not consider that the award of the Industrial Court suffers from any vitiating defect, different considerations may or may not arise upon the application for reference under s 33A of the Act. This is also a matter upon which the Industrial Court will have to make up its own mind.

Having said that, there is a separate point which calls for consideration, and this concerns the order for stay granted by the judge of the reinstatement order made by the Industrial Court in favour of the employee. It goes without saying that having regard to our view that the application to set aside the order for leave should have been granted, the order for stay falls with it. But, quite apart from this ground, there was a further ground also, why the judge was wrong in granting the order for stay of the reinstatement order. We refer to s 33B(2) of the Act, which imposes an absolute bar against the making of such an order for stay, in the following terms:

> Subject to the provisions of section 33A, no award of the Court for the reinstatement or re-employment of a workman shall be subject to any stay of proceedings by any court.

Section 33A which requires the Industrial Court, upon granting an application by any party to proceedings in which an award has been made, to refer a question of law for the determination of the High Court, to direct a stay of the whole or part of an award, was of course, of no relevance to the present case, bearing in mind that no such application had been granted.

Now, the general powers which the court has, in the exercise of its inherent jurisdiction, to grant a stay of execution by virtue of s 25 of the Courts of Judicature Act 1964, read with the Schedule thereto, or for that matter, the general powers which the court has by virtue of O 53 r 1(5) of the RHC, which provides that the grant of leave to commence certiorari proceedings shall, if the court so directs, operate as a stay, must yield to the provisions of s 33B(2) — quoted above — which is a specific measure relating to reinstatement or re-employment of a workman, and must therefore have overriding effect. The judge, therefore, had *no power* to grant the order for stay with regard to the order for reinstatement and, consequently no question of his *discretion* to do so could possibly have arisen.

Before leaving this case, we hasten to add a word of caution, and it is this: applications to set aside leave granted in judicial review proceedings should only be made in exceptional circumstances. (See Popplewell J in *R v Bromsgrove District Council, ex p Kennedy* (*The Times*, 28 November 1991.) So, for example, in *R v Secretary of State for the Home Department, ex p Khalid Al-Nafeesi* [1990] COD 106, Scheimann J said that leave should be set aside where a judge was satisfied that there was absolutely no arguable case. Similarly, in *R v Secretary of State for the Home Department, ex p Angur Begum* [1989] COD 398, Mc Cowan J applied the same test.

To summarize the conclusions expressed above:

(1) the judge was right in holding that there had been no non-disclosure of a material fact on the part of counsel for the employer;

(2) the judge was, however, wrong in dismissing the application to discharge the order for leave to apply for an order of certiorari aforesaid and the order for stay because:

(a) the statements and the affidavit filed in support of the application for leave to apply for an order for certiorari aforesaid, were insufficient for purposes of O 53 r 1(2); and

(b) in any event, quite apart from non-compliance with the provisions of O 53 r 1(2), having considered the merits of the employer's case, so far as the application for leave to apply for an order of certiorari was concerned, there was absolutely no arguable case, so that a substantive inter partes application for certiorari was bound to fail;

(3) in consequence, the order for stay had to be discharged, and, quite apart from that, it was an order which the judge was debarred from making regard being had to the prohibition imposed by s 33B(2) of the Act;

(4) the effect of our conclusions aforesaid was to restore the award of the Industrial Court made in favour of the employee in its entirety; and2

(5) the employer's application for reference under s 33A of the Act, now pending in the Industrial Court, will have to be heard and determined on its merits.

Appeal allowed.

Reported by Prof Ahmad Ibrahim